IN THE

Supreme Court of the United [illegible]

OCTOBER TERM 1941

JACOB NOVICK,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION AND BRIEF IN SUPPORT OF A[illegible] TION FOR REHEARING OF PETITION [illegible] WRIT OF CERTIORARI

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PETITION FOR REHEARING

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Jacob Novick, respectfully prays this Court to reconsider its determination made on March 2, 1942, which denied his petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of conviction of the crime of conspiracy to defraud the United States of taxes on distilled spirits.

The Court is referred to the original petition and brief filed herein in January, 1942, the contents whereof are reiterated and incorporated.

Petitioner, a restaurateur of reputable and law-abiding character, has been sentenced to a term of twenty months' imprisonment and a fine of $5,000 (R. 511). He was convicted under an indictment naming seventy-three defendants, sixteen of whom were tried simultaneously. Four

were acquitted. The case of this petitioner alone gave the utmost difficulty to the jury, which reported in writing seven hours after the submission of the cause (verdicts having already been rendered as to all the rest), "The jury is sorry to report that it is split on Jacob Novick after long and careful discussion" (R. 504). It was not until the afternoon of the following day, after several supplementary charges (R. 505-510), that the jury finally reported a verdict adverse to petitioner.

It is obvious that in such circumstances petitioner could receive exact justice only in a trial reasonably free from taint of error and by a scrupulous adherence to both procedural safeguards and substantive rules applicable to such a case. Petitioner has at all times insisted upon his innocence of the offense charged. His conviction herein is directly ascribable to the failure of the learned Trial Court to accord him a fair trial—not through any deliberate or advised desire to curtail his rights but by virtue of a series of important and prejudicial rulings.

The questions at issue involve important points of criminal law and procedure, all of them of a character frequently arising in federal courts. It is desirable that they be clarified by a plenary review, to the end that the law be settled or better understood, and, more specifically, that this petitioner should not be unjustly punished.

Your petitioner, therefore, respectfully submits that a rehearing should be granted herein and the determination of this Court denying the writ of certiorari set aside and a writ of certiorari to review the judgment of conviction granted.

March 17th, 1942.

Jacob W. Friedman,
Counsel for Petitioner.

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BRIEF ON APPLICATION FOR REHEARING

The same order of discussion of points is preserved herein as in the original application.

I

The Government's assertion in its brief (p. 11) that petitioner's reliance upon *United States* v. *Falcone*, 311 U. S. 205, is "apparently advanced for the first time in the petition", is erroneous. The case was cited by the writer in the Circuit Court of Appeals as controlling the instant situation. If there be any doubt that the *Falcone* case governs this appeal, it is most desirable that the principles laid down therein be explained and their precise limits declared. In conjunction with the earlier holding in *Durland* v. *United States*, 161 U. S. 306, indicating that negligence or naïveté cannot be a substitute for criminal intent, it is submitted that petitioner's conviction should not be sustained as matter of law. In the Government's attempt to distinguish the instant case, it makes several misleading

references (p. 11) to the petitioner's handling certain payments for other defendants, notwithstanding the fact that these acts were merely innocent accommodations. The suggestion is even made that guilt can be inferred from his having paid another "for dismantling and removing one of the stills". Surely the eradication of an instrumentality of crime does not constitute evidence of guilt. Petitioner realizes that this is no occasion for extended scrutiny of the evidence; yet a thorough examination of the record will not disclose any appreciable evidence to differentiate the issue from that presented in the *Falcone* case, to the benefit of which holding petitioner is entitled.

II

Attempts in one form or another of the Government to show that a defendant has committed other and unrelated offenses have given rise to a host of decisions bearing upon the general rule and its limitations. Herein the prosecution was permitted to impeach petitioner on a collateral issue and to suggest thereby that he was guilty of an unrelated felony. The attempted justification of this gross invasion of his rights upon various obscure grounds falls utterly short of adducing any legal excuse. The last suggestion (brief, pp. 13-14), that petitioner admitted that he occasionally played policy (a misdemeanor) and that thus he could not be harmed by the intimation that he was a policy banker (a felony), is altogether novel. The frequency with which the question of proof of other crimes arises renders desirable an authoritative exposition of the doctrine in its incidence to this case.

III

The Government has cited no case, and petitioner is aware of none, wherein this Court has passed upon the propriety of a trial judge's holding a recalcitrant witness in contempt in the presence of a jury, to the detriment of a defendant's rights.

IV

Petitioner was undoubtedly prejudiced by the reception in evidence of telephone company toll slips and a prepared chart showing that calls were made from and to public telephones located in his restaurants (respectively to and from telephones listed in the names of co-defendants). The Government boldly asserts (p. 15), "The jury was entitled to infer from this evidence that the calls in question were made by or to petitioner." Petitioner does not believe that this Court has ever approved any such ruling, most assuredly with respect to *public* telephone instruments. If this be the type of evidence upon which prosecutors are now relying to obtain convictions, it is desirable that the correctness of so significant a ruling be authoritatively determined.

V

In contravention of established law, the Trial Court received against petitioner the alleged declarations of co-conspirators after the termination of the conspiracy. It is fallaciously argued that the very declarations by their contents demonstrate the continuation of the conspiracy, and the proffered evidence is thus lifted by its own bootstraps into a status of admissibility.

VI

The Circuit Court of Appeals admitted in its opinion that the charge was improper on the subject of reasonable doubt, characterizing the "homely examples" mentioned by the Trial Court in the supplementary instructions (the jury having specifically requested a redefinition of reasonable doubt) as "trivial examples", "most doubtful", "an ill-chosen illustration" and a "somewhat cloudy allusion". The Circuit Court of Appeals, however, relied on the main charge (given to the jury the day previously) as adequate to nullify any possible harmful effect arising from these

final words (which came twenty minutes before the verdict). Petitioner insists that any such instructions, whose effect is "to entirely eliminate the doctrine of reasonable doubt from the consideration of the jury"—in the language of *Paddock* v. *United States* (C. C. A. 9), 79 F. (2d) 872—must be deemed material.

VII

The jury herein was required to deliberate an inordinate length of time with respect to petitioner, the effect of which under the circumstances disclosed was to coerce or induce a verdict of guilt.

VIII

The cumulative effect of what has been discussed above, as well as in petitioner's original papers, was such as to deprive him of a fair trial. Errors which might be disregarded in a case where the proof of guilt was clear become especially important and prejudicial when, as herein, the jury had such difficulty in arriving at its verdict.

CONCLUSION

Petitioner respectfully urges this Court to rescind its determination made on March 2, 1942, denying his petition for a writ of certiorari and that it grant such writ to the United States Circuit Court of Appeals for the Second Circuit to review the conviction herein.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioner.